IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/01/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

S.A.No.1631 of 1992
and
CROSS OBJECTION No.158 of 1993

1. Rajammal
2. Palanivel
3. Devaki
4. Rajendran .. Appellants in SA 1631/92
and Respondents in
Cross Objn.158/93

-Vs-

Marudammal .. Respondent in SA 1631/92
and Cross Objector in
Cross Objn.158/93

The Second Appeal has been preferred under S.100 of The Code of Civil Procedure and the Cross Objection under Order 41 Rule 22 of CPC both against the judgment and decree dated 27.8.1991 made in A.S.No.138/88 on the file of the Subordinate Judge, Ariyalur.

!For Appellants in
SA 1631/92 and
Respondents in
Cross Objn.158/93 : Mr.P.Valliappan
for Mr.M.S.Krishnan

^For Respondent in
SA 1631/92 and
Cross Objector in
Cross Objn.158/93 : Mr.S.Balasubramanian

:COMMON JUDGMENT

Plaintiffs 2 to 5 are the appellants herein, and the defendant is the cross objector herein.
2. Both the second appeal and the cross objection have arisen from the judgment and decree of the learned Subordinate Judge, Ariyalur made in the first appeal preferred by the defendant.
3. The case of the plaintiffs is that the first plaintiff received a loan of Rs.1,000/- from the defendant's husband on 27.12.1968; that the same

was a mortgage by conditional sale; that under the agreement dated 23.4.1969, the defendant has agreed to sell the property to the first plaintiff alone; that the first plaintiff was ready and willing to pay Rs.1,000/-; that the defendant was in possession of the property; that despite many demands, the defendant failed to complete the sale transaction, and hence, the suit property has to be handed over to the first plaintiff.

4. The defendant contested the suit by stating that the suit property was treated as joint family property; that the sale deed dated 27.1 2.1968 was valid; that it was not a mortgage deed; that the signature in the agreement was not that of the defendant; that the alleged agreement dated 23.4.1969 is not true and genuine, and the same is unenforceable; and hence, the suit has to be dismissed.

5. The trial Court after framing the necessary issues decreed the suit for specific performance, as asked for by the appellants/ plaintiffs. Aggrieved respondent/defendant preferred an appeal, and the learned Subordinate Judge while affirming that part of the decree of the trial Court as to the specific performance, made a modification that the sale deed should be executed on payment of consideration viz. the prevailing market value of the suit property. Aggrieved over the same, the plaintiffs 2 to 5 have brought forth the second appeal. The defendant has brought forth the cross objection as stated above.

6. At the time of admission, the following substantial question of law was formulated for consideration:

"Whether the lower appellate Court is correct in law in making an altogether new agreement between the parties to the suit by directing the appellants to pay the market value for the suit property when a specific price has been agreed upon between the parties under Ex.A-1 agreement?"

7. As could be seen from the available materials, the first plaintiff, while he borrowed Rs.1,000/- from the defendant's husband on 27.12 .1968, executed Ex.A2 document. Subsequently on 23.4.1969, the defendant executed Ex.A1 agreement agreeing to re-convey the property on receipt of the sale consideration found in the earlier document viz. Rs.1,000/-. According to the plaintiffs, the demands were made for the re-conveyance of the property, and since there was default on the part of the defendant, the plaintiffs were constrained to file the suit. The plaintiffs came forward with a case that Ex.A2 document was only a mortgage by conditional sale, and hence, it would be binding on the defendant, and he has to render possession of the property. Agreeing with the contentions put forth by the defendant's side, both the Courts below have concurrently found that Ex.A2 was a sale deed, pursuant to which the defendant got possession of the property.

8. As far as the document dated 23.4.1969 under Ex.A1 was concerned, the specific case of the plaintiffs was that the agreement was executed by the defendant, agreeing to re-convey the property by getting the sale consideration of Rs.1,000/-; that he has been in enjoyment of the property; that despite the notice, he did not execute the sale deed; and therefore, he should be directed to execute the sale deed. The defence that was taken by the defendant, as seen from the available materials, was that the document itself was a forged one, since he did not execute the document; that the signature found therein did not belong to him; and apart from that, the document could not be enforced, since it was an unlawful and illegal one. As regards this contention, the trial Court agreed with the plaintiff and

directed the defendant to execute the sale deed by receiving the consideration found therein viz. Rs.1,000/-. When the said finding was appealed against before the first appellate forum, after discussing the same, the learned Subordinate Judge was of the opinion that the document found under Ex.A1 was one opposed to public policy, in view of the fact that the sale consideration found in Ex.A2 sale deed viz. Rs.1,000/- is found in Ex.A1 agreement also; and that it is not only improper, but also opposed to public policy. However, the learned Subordinate Judge has directed the execution of the sale deed by the defendant by receiving the value of the property prevailing at the time of execution of the sale deed. Hence, the only questions that would arise for consideration as formulated above, is whether the Ex.A1 agreement has got to be set aside, because it was opposed to public policy, and whether when a specific price has been found in the agreement, the Court can substitute a new agreement and direct the parties to follow the same.

9. The learned Counsel appearing for the appellants-plaintiffs would submit that Ex.A1 agreement is not opposed to public policy; that it is pertinent to note that under the first document viz. Ex.A2, the possession was actually handed over to the defendant; that the defendant was in enjoyment of the property all along; that there is specific averment as to the consideration payable by the first plaintiff to the defendant at the time of re-conveyance; and thus, no question of going into the adequacy of consideration would arise; that once there was consensus between the parties as to the consideration, it was not for the Court to substitute a new agreement in its place and direct the parties to pay any more consideration than found therein, and under such circumstances, the judgment of the trial Court has got to be restored, and the judgment of the first appellate Court has got to be set aside. Vehemently opposing the above contentions, the learned Counsel appearing for the respondent/defendant would submit that while the first appellate Court has found Ex.A1 agreement as unenforceable, since it is opposed to public policy, it should not have split up and given enforcement to the agreement by directing the payment of the value of the property; and that once it has been found that the agreement was opposed to public policy, the appeal filed by the defendant should have been allowed by the lower appellate Court in entirety, and hence, that part of the judgment by the first appellate Court has got to be set aside.

10. After hearing the rival submissions and careful consideration of the materials on hand, the Court is of the considered view that the judgment of the learned Subordinate Judge has got to be set aside.

11. Both the Courts below have concurrently found that Ex.A2 was a sale deed, pursuant to which the defendant got possession of the property. So far as Ex.A1 document was concerned, both the Courts have found that it was an agreement for sale of the property, and the plaintiffs have got existing right to get the conveyance of the property from the defendant. It is admitted by both sides that the consideration found under Ex.A1 is Rs.1,000/-. It remains to be stated that the property was in continuous possession of the defendant from the time of Ex.A2, and thus, he was in enjoyment of the property. Under such circumstances, while the parties with their consensus found the consideration at Rs.1,000/- for re-conveyance of the same property under Ex.A1, it cannot be stated that the consideration was unreasonable, below, inadequate or in any way opposed to public policy. It is true that the agreement cannot be split up, and the Court should not substitute a new

agreement, thrusting the parties to certain things which they have not agreed upon. Thus, the learned Subordinate Judge was not proper in directing the parties to pay any more consideration than what has been found in the agreement. That apart, the contention of the cross objector that the plaintiffs seeking the specific performance did not come with clean hands, since when they filed the suit, they did not base their claim for specific performance on the basis of Ex.A1 agreement, but they wanted to get the redemption under Ex.A2 calling it as a mortgage, and under such circumstances, the relief of specific performance should not have been granted has been negatived by both the Courts. The Court is unable to appreciate this contention for the simple reason that the plaintiffs, when they filed the suit, have made the alternative relief of specific performance, and the same would make it abundantly clear that they have not suppressed the fact. Apart from that, it has got to be stated that insofar as Ex. A1 agreement, the defendant took up a plea that it was a forged one, which was rejected by both the Courts.

12. Taking into consideration all the above, the lower appellate Court was not correct in recording a finding that the agreement under Ex.A1 was opposed to public policy or directing the plaintiffs to pay any more consideration than what is found under Ex.A1. Hence, the judgment and decree of the learned Subordinate Judge have got to be set aside, and the judgment and decree of the trial Court have to be restored.

13. In the result, the second appeal is allowed setting aside the judgment and decree of the lower appellate Court. The trial Court's judgment and decree are restored. The cross objection is dismissed. The parties both in the second appeal and in the cross objection shall bear their own costs.

Index: Yes
Internet: Yes

nsv/

To:
1. The Subordinate Judge,
Ariyalur
2. The District Munsif
Jayamkondan

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